

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROBERT WINSTON, et. al.,

Plaintiffs,

- against -

CITY OF NEW YORK, et al,

Defendants.

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**REPORT AND
RECOMMENDATION
06 CV 3943 (NG)**

On August 16, 2006, plaintiffs Robert Winston and Angela Winston filed this action against the City of New York and the New York City Police Department (the "City defendants"), alleging violations of 42 U.S.C. § 1983. Currently pending before the Court is defendants' letter motion to dismiss for failure to prosecute. Plaintiffs have not responded to the motion, nor have they complied with the Court's August 13, 2008 Order requesting a status report.

This is not the first occasion on which plaintiffs' counsel has failed to supply a status report or appear for a conference in this action. On November 30, 2006, this Court held an initial conference in the case, at which time a discovery schedule was set and a subsequent conference was scheduled for March 2007. Following a request from plaintiffs' counsel, that conference was rescheduled for April 18, 2007, at which time plaintiffs' counsel failed to appear.

By letter dated May 1, 2007, plaintiffs' counsel informed the Court that plaintiff Robert Winston had died in a car accident and requested that the action be adjourned to allow plaintiff's mother to file for letters of administration. That request was granted, and on May 14, 2007, a suggestion of death as to Robert Winston was filed.

On September 6, 2007, having heard nothing from plaintiffs' counsel, the Court issued

an Order directing the parties to provide a status report within thirty days. On October 9, 2007, having received no status report from either party, the Court issued a second Order directing the submission of a status report and warning that if no status report was received, the Court would recommend that the case be dismissed for failure to prosecute.

On November 9, 2007, the City defendants submitted a letter requesting that the Court recommend that the case be dismissed for failure to prosecute because plaintiffs' counsel had failed to submit a status report. On that same day, the Court received a letter from plaintiffs' counsel indicating that an administrator had been appointed and requesting that the Court issue a scheduling order to allow counsel to amend the Complaint to reflect the substitution of the Administrator. In response, the Court scheduled a conference for November 29, 2007 to address scheduling issues. At that conference, the Court issued an Order requiring the exchange of certain discovery as well as setting a procedure for filing an amended complaint.

On December 21, 2007, defendants' counsel again moved to dismiss for failure to prosecute, arguing that plaintiffs had failed to provide a properly executed 160.50 release by December 8, 2007 as ordered by this Court. The Court deferred ruling on the motion, instead ordering plaintiffs to respond to defendants' letter by January 18, 2008 and warning that if no response was received, the case would be dismissed for lack of prosecution.

On January 25, 2008, plaintiffs' counsel explained that he had been unable to file the motion to substitute the administrator due to secretarial issues in counsel's office. The Court granted counsel's request to delay ruling on the motion until February 18, 2008. On March 11, 2008, the Motion to Substitute Party was granted by the district court. Since that time, the Court heard nothing from the parties and accordingly issued an Order on August 13, 2008, requesting a

status report from the parties. Although a report was received from defendants' counsel dated September 11, 2008, requesting dismissal for failure to prosecute, the Court has not heard from plaintiffs' counsel.


Given the lack of progress in this case, and the failure of plaintiffs' counsel to respond to the Court's August 13, 2008 request for a status report, the Court respectfully recommends that the action be dismissed for failure to prosecute.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's Order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to send copies of this Report and Recommendation to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
September 18, 2008


Cheryl L. Pollak
United States Magistrate Judge